

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of

Amendment of the Commission's
Rules Regarding the 37.0-38.6 GHz and
38.6-40.0 GHz Bands

Implementation of Section 309(j) of the
Communications Act - Competitive
Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz

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) ET Docket No. 95-183
) RM-8553
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) PP Docket No. 93-253 /
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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COMMENTS OF AMERITECH CORPORATION

Ameritech Corporation ("Ameritech"), pursuant to Rule Section 1.415(a), hereby submits its comments in response to the *Notice of Proposed Rule Making* 61 Fed. Reg. 2452 (December 15, 1995) ("*NPRM*"), in the above-captioned proceeding. The *NPRM* specified a comment deadline of January 16, 1996, which was extended by the Commission to February 12, 1996. See *Order Extending Time*, DA 96-15, released January 16, 1996.

Ameritech urges the Commission to immediately resume processing applications for fixed point-to-point microwave service in the 38.6-40.0 GHz ("39 GHz") band that were filed in accordance with the Commission's Rules prior to the November 13, 1995 processing freeze. In processing these applications, Ameritech requests that the Commission enforce strictly the policies stated by the Common Carrier Bureau in its *Public Notice* of September 16, 1994.¹ Specifically, the Commission should follow its "one-to-a-customer" policy with respect to the 39 GHz channels and dismiss as defective any applications which did not specify one 39 GHz channel as of November 13, 1995, or which do not otherwise meet the requirements of the September 1994 *Policy Statement*. Any remaining applicants that are still subject to mutual exclusivity should be allowed to file minor amendments to reduce their proposed service area contours or otherwise enter into settlement agreements to resolve their conflicts.

¹ See *Public Notice*, Mimeo No. 44787 (released September 16, 1994) "*Policy Statement*."

I. INTEREST OF AMERITECH IN THIS PROCEEDING

On September 25, 1995, Ameritech, through its local exchange carrier subsidiaries Illinois Bell Telephone Company, The Ohio Bell Telephone Company, Michigan Bell Telephone Company, Indiana Bell Telephone Company, and Wisconsin Bell, Inc., filed seven (7) applications for fixed point-to-point microwave systems in the 39 GHz band. In accordance with the Commission's September 1994 *Policy Statement*, Ameritech subsequently filed amendments to each of these applications to specify one of the available 39 GHz channels. Each of the seven applications was filed in accordance with the Commission's Rules and was filed within the 60-day filing window opened by a previous co-channel applicant. Indeed, Ameritech may have had a grant of some of its applications by now, except that the Commission's processing of 39 GHz applications has been clogged by applicants seeking multiple channels, in contravention of the Commission's "one-to-a-customer" policy. Ameritech and its local exchange subsidiaries have a clear and substantial interest in the instant proceeding because the processing of Ameritech's 39 GHz applications was suspended by the Commission's November 13, 1995 freeze order, and the proposals contained in the Commission's *NPRM* could reduce or eliminate the likelihood of Ameritech ultimately receiving a grant of any of its applications.

The radio systems proposed in Ameritech's applications will allow its local exchange carriers to provide rapid, cost effective and reliable access to the PSTN. CMRS providers have made it clear to Ameritech that such interconnection is vital to their emerging businesses. By using high-capacity short-haul microwave links in this manner, Ameritech will be able to speed the implementation of its wireline service by being able to activate a link without the need for procurement of rights of way and construction of wireline facilities. Moreover, such microwave facilities are better suited for those settings where wirelines may be damaged by the effects of storm, snow, vandalism or floods and will help Ameritech provide its customers with the

consistent, high-quality service they need. Therefore, Ameritech's proposed uses for 39 GHz facilities will help CMRS providers to rapidly implement service over their ever-changing and expanding systems.

Ameritech also seeks to utilize these 39 GHz channels to provide a variety of new, flexible and cost-effective services to its customers utilizing local area networks ("LANs"), to provide redundant paths of communications for links that are prone to flooding or which are used for priority and emergency communications, and to provide wireless local loop service, in appropriate settings.

II. REVISION OF THE LICENSING RULES FOR THE 39 GHz BAND

In its *NPRM*, the Commission proposes to use the same auction procedures and define exclusive service areas in the same way (*i.e.* BTAs) for the 39 GHz band as it has proposed for the 37 GHz band. The Commission proposes that all 39 GHz BTA channel blocks that are not encumbered with previously licensed rectangular service areas be auctioned at the same time as the 37 GHz band. Those 39 GHz BTA channels that are encumbered will be auctioned at a later date. Ameritech strongly disagrees with the Commission's proposal, to the extent that it would necessitate the wholesale dismissal of applications that are subject to mutual exclusivity. Instead, the Commission should resume the processing of applications in the 39 GHz band that were filed prior to November 13, 1995, enforce vigorously its one-to-a-customer policy with regard to these channels, and afford pending 39 GHz applicants the opportunity to resolve mutual exclusivity on their own.

A. THE FCC SHOULD RESUME WITHOUT DELAY THE PROCESSING OF APPLICATIONS IN THE 39 GHz BAND

Ameritech respectfully requests that the Commission resume without delay the processing of applications in the 39 GHz band which were filed prior to November 13, 1995 freeze.

Ameritech, and many other applicants, filed 39 GHz applications in accordance with the Commission's Part 21 Rules as well as policies stated by the Common Carrier Bureau in its September 1994 *Policy Statement*. To dismiss such applications after applicants have expended much time and effort in preparing them, paid the fees of attorneys and frequency coordinators, and also paid filing fees to the FCC would be unfair and contrary to settled principles of administrative law. The Commission should enforce strictly its policies with respect to the existing 39 GHz applications and dismiss all applications that did not specify one (1) 50 MHz channel pair as of November 15, 1995. It should then process the remaining applications, in the order they were received, and allow applicants to file minor amendments and requests for settlement to resolve mutual exclusivity.

1. To Dismiss Pending 39 GHz Applications That Were Filed in Accordance with the FCC's Rules and Policies Would Be Unfair and Constitute an Unreasonable Retroactive Application of the Commission's Rules

While the *NPRM* does not specifically address how the Commission proposes to dispose of pending applications for 39 GHz frequency assignments, it is clear that any proposal to auction licenses in the 39 GHz band (subject to protection of incumbent *licensees* only) would necessitate the dismissal of all pending applications that are subject to mutual exclusivity and/or that were filed after September 13, 1995. This would be grossly unfair. The FCC should not upset the expectancies of Ameritech and hundreds of other applicants who filed their applications in accordance with the FCC's policies and Rules and should not apply its rules retroactively to dismiss these pending applications in the 39 GHz band.

It is well settled that the retroactive application of administrative rules and policies is looked upon with disfavor by the Courts. See *e.g.* *Bowen v. Georgetown University Hospital*, 488 U.S. 208 (1988) (Retroactivity is not favored in law); *Yakima Valley Cablevision v. FCC*, 794 F.2d 737, 745 (D.C. Cir. 1986) ("Courts have long hesitated to permit retroactive

rulemaking and noted its troubling nature."). This is especially true where the result would be the dismissal of an application. When implementing regulations or policies and procedures with retroactive application, that the Commission must balance the "mischief" caused by such regulation against the "salutary" or beneficial effects, if any, which reviewing courts, in turn, must critically review on appeal to ensure that competing considerations have been properly considered. *Yakima Valley Cablevision*, 794 F.2d at 745-46. See *Securities and Exchange Commission v. Chenery*, 332 U.S. 194, 203 (1947).

Ameritech respectfully submits that dismissal of pending 39 GHz applications that were filed in accordance with the Rules and policies of the Commission, whether directly (through an Order) or indirectly (by ordering the auction of the same channels without processing duly filed applications) would not appropriately strike the balance between the mischief of disrupting the 39 GHz licensing process and depriving applicants of their rights, versus the dubious benefit of auctioning spectrum which is already heavily licensed. The Commission must not follow this course of action and should instead resolve how it is going to deal with mutually exclusive applicants during this proceeding. To ignore the interests of these pending applicants simply because "attempting to award licenses in mutually exclusive situations under [the FCC's] current rules could lead to results that are inconsistent with the objectives of this proceeding" only underscores the unfairness inherent in such a dismissal. While auctions may be appropriate in the relatively unlicensed 37 GHz band, they are of questionable value in the heavily-licensed 39 GHz band, especially when licenses have been awarded for service areas that are incompatible with the proposed BTA scheme. Having invited the industry to license these channels based on the current rules, the Commission should not now punish those applicants who pursued their business plans accordingly. The 37 GHz allocation should be able to provide adequate spectrum for all PCS, cellular and wide area SMR licensees in any geographic area, with capacity to spare.

2. The Commission Should Enforce Strictly Its Policies With Respect To the Existing 39 GHz Applications

As an alternative to dismissing all mutually exclusive 39 GHz applications, the Commission should enforce strictly the policies which it stated in its September 13, 1994 *Policy Statement*. Specifically, all applicants must: (1) demonstrate why non-RF solutions are not acceptable, notwithstanding economics alone; (2) demonstrate a clear and present need for the proposed communications; (3) limit their applications to a single, specific channel pair in each market; and, (4) fully disclose the real parties in interest, including relationships to other applicants. Ameritech believes that a rigorous and uniform application of these policies is much fairer to all applicants than the wholesale dismissal of pending applications, and will resolve most instances of mutual exclusivity. Indeed, the Commission's public notices reflect that many of the conflicting channel proposals creating mutual exclusivity have been filed by entities seeking a second, third or fourth channel in the same market.

In conjunction with the rigorous enforcement of its previously stated policies, the Commission should allow current applicants in the 39 GHz band who meet these requirements further opportunity to negotiate settlements and amend their pending applications accordingly to resolve mutual exclusivity. Once applicants know with specificity the identity and location of all of the co-channel applicants in their geographic region, applicants will have the ability and incentive to negotiate mutually-agreeable settlements quickly.

This approach would be consistent with the auction authority given by Congress to the Commission. As Commissioner Chong correctly observes, Section 309(j)(6)(E) of the Communications Act of 1934, as amended, (the "Act") states that competitive bidding authority shall not "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations,

and other means in order to avoid mutual exclusivity in application and licensing proceedings." Moreover, Section 309(j)(7)(B) provides that "the Commission may not base a finding of public interest, convenience and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection." Thus, rather than trying to auction spectrum with limited potential value to non-incumbents, the Commission should follow the Congressional mandate to complete the existing 39 GHz licensing process through the application of "threshold qualifications and service regulations" (such as the one-to-a-customer restriction), as well as the encouragement of "engineering solutions and negotiation" to allow the maximum licensing of service areas that are carefully tailored around existing operations.

Moreover, the Commission can discourage speculators in the settlement process by imposing rigorous construction and operational requirements on all 39 GHz licensees, and requiring that licensees meet these threshold requirements before they are allowed to transfer their systems.

B. IF FUTURE LICENSING IN THE 39 GHz BAND IS BY AUCTION, THE COMMISSION SHOULD LIMIT AUCTION ELIGIBILITY TO EXISTING APPLICANTS IN THAT BTA

If, contrary to Ameritech's proposal, the Commission chooses to adopt competitive bidding to distribute licenses in the 39 GHz band and does not process the 39 GHz applications that are currently subject to mutual exclusivity, the Commission should at least limit eligibility for the 39 GHz licenses to entities with existing licenses or applications pending in that particular BTA. Ameritech submits that this would be the fairest way for the Commission to license the 39 GHz band by auction, while accommodating the interests of existing mutually exclusive applicants. Moreover, this proposal, combined with reasonable construction and service requirements and limitations on license assignment or transfer, would discourage speculators looking only for windfall profits in an aftermarket.

In order to meet the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, the Commission should limit the number of 39 GHz licenses that any current applicant or licensee may obtain at auction in a particular BTA to one (1). It should also limit the participation of incumbent licensees that already own or control two or more channels in a particular BTA to bidding on the channels for which they are already licensed. Ameritech believes these proposals will eliminate, or substantially mitigate, the "swiss cheese" effect created by the incompatible licensing schemes, increase the value and utility of 39 GHz licenses, and promote the rapid harmonization of the 39 GHz and 37 GHz bands.

Ameritech believes a limited-eligibility auction for current 39 GHz applicants and incumbents could be held at the same time (and largely under the same rules) as any proposed auction(s) for 37 GHz channels in the same BTA. This would allow the FCC to license the remainder of the 39 GHz band in an expeditious manner, provide bidders with information about the value of similar licenses, and conserve scarce administrative resources. Moreover, since eligibility for 39 GHz licenses would be limited, and since many of the current 39 GHz licensees and applicants are individuals or small businesses, any enhancements (*e.g.* bid credits, installment financing terms) which the Commission sees fit to adopt for such an auction should be modest.

III. PERMISSIBLE USES OF 37 - 39 GHz FREQUENCIES

The Commission correctly observes that the 37-39 GHz spectrum will be useful for backhaul/backbone requirements of PCS and cellular licensees. Also, as discussed above, Ameritech and other entities propose to serve the public interest by offering a number of other,

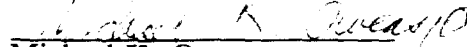
innovative services on these channels, including wireless equal access, LAN-to-LAN communications, etc. Therefore, Ameritech believes that the Commission should not place undue restrictions on the use of this spectrum.

CONCLUSION

WHEREFORE, in light of the foregoing, Ameritech respectfully requests that the Commission act in accordance with the preceding comments.

Respectfully Submitted,

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